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No. _____

Supreme Court, U.S.
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# In the Supreme Court of the United States

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RONALD D. EDWARDS, WARDEN,
*Petitioner,*

*v.*

ROBERT W. CARPENTER,
*Respondent.*

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a federal habeas court is barred from considering an ineffective-assistance-of-counsel claim as "cause" for the procedural default of another habeas claim when the ineffective-assistance claim is itself procedurally defaulted.

## PARTIES TO THE PROCEEDING

Petitioner is the warden of the Correctional Reception Center in Orient, Ohio.

Respondent is currently incarcerated at the Correctional Reception Center.



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**In the Supreme Court of the United States**

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No. _____

RONALD D. EDWARDS, WARDEN,
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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## PETITION FOR A WRIT OF CERTIORARI

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The Attorney General of Ohio, on behalf of Ronald D. Edwards, Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 163 F.3d 938. The opinion of the district court (Pet. App. 19a-38a) is unreported. The opinion of the Ohio court of appeals (Pet. App. 39a-42a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on December 28, 1998. A petition for rehearing was denied on March 24, 1999. Pet. App. 18a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

3. Relevant provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, 28 U.S.C. 2254(b)(1), provide:

§ 2254. State custody; remedies in Federal courts

***

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that --

(A) the applicant has exhausted the remedies available in the courts of the State; or



(B) (i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

4. Rule 26(B)(1) of the Ohio Rules of Appellate Procedure provides: "A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time."

## INTRODUCTION

This petition presents an important question of federal habeas procedure on which the circuit courts of appeals are now divided. The question is whether the procedural default of an ineffective-assistance-of-counsel claim precludes that claim from serving as cause for the procedural default of other claims presented on federal habeas. In this case, the court of appeals acknowledged that the ineffective-assistance claim was itself procedurally defaulted, but nonetheless considered the merits of that claim, and concluded that it could serve as the cause for another procedural default. Pet. App. at 10a-11a. The court's consideration of the ineffective-assistance claim, notwithstanding the explicit recognition of its procedural default, is in direct conflict with the ruling of all other circuit courts of appeals on precisely the same issue.

Those other courts have held -- and properly so -- that ineffective assistance of counsel cannot serve as "cause" for the procedural default of another claim if the ineffective-assistance claim is itself procedurally defaulted. Moreover, the reasoning of these other courts is sound -- and the conflicting approach of the Sixth Circuit is unsound -- for one simple reason: in order to find that ineffective assistance of counsel caused the procedural default of some other habeas claim, a habeas court necessarily must reach the merits of the ineffectiveness claim *even though the State's courts have declined to do so* in light of the prisoner's procedural default of it. Only if a habeas claimant can show "cause and prejudice" for the procedural default of the ineffective-assistance claim would this procedural default be excused, *see Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), and absent such a showing, the State's procedural rule ought to bar federal-court review of the claim.

Yet, in this case, the court of appeals never considered whether there was cause for the prisoner's default of his ineffective-assistance claim, believing it unnecessary to do so as long as the claim was exhausted in state court. Because this errant approach mistakenly overlooks the importance of subjecting procedurally defaulted ineffective-assistance claims to the same cause and prejudice analysis that applies to all other federal habeas claims, and because it stands as an outlier next to the proper analysis applied by other federal courts, we respectfully ask the Court to grant certiorari in this case.



## STATEMENT

Respondent Robert W. Carpenter pled guilty to the crimes of aggravated murder and aggravated robbery in an Ohio trial court in 1990. Those charges stemmed from the murder and robbery of a 73-year-old woman, who had been bludgeoned to death with a blunt object in her Columbus, Ohio home in October 1988.

Carpenter entered his guilty pleas in accordance with *North Carolina v. Alford*, 400 U.S. 25 (1970), and a three-judge panel found Carpenter guilty after the prosecution presented a statement of the facts. After conducting a sentencing hearing, the three-judge panel sentenced Carpenter to life imprisonment with parole eligibility after thirty years.

Carpenter appealed (through counsel), alleging that the evidence presented at the sentencing hearing established that he should have received a sentence of life imprisonment with parole eligibility after twenty years rather than thirty. The court of appeals affirmed, however, *see* 1991 WL 35009 (March 12, 1991), and Carpenter did not appeal this decision to the Ohio Supreme Court.

The following year, Carpenter filed a *pro se* petition in the state trial court, asking that court to vacate his convictions and sentences in light of his trial counsel's alleged ineffectiveness. He also argued that he had been coerced into entering his guilty pleas, and cited other unspecified constitutional violations. The trial court dismissed the petition on June 18, 1992, finding it too conclusory to state any valid grounds for relief under O.R.C.

2953.21, Ohio's post-conviction relief statute. The state court of appeals affirmed the dismissal, *see* 1992 WL 361815 (December 3, 1992), and the Ohio Supreme Court declined to review the case. *State v. Carpenter*, 66 Ohio St. 3d 1456, 610 N.E.2d 421 (1993).

On July 1, 1993, Rule 26(B) of the Ohio Rules of Appellate Procedure took effect. The relevant portion of that rule is reproduced on page 3 of this petition. It was issued in response to the Ohio Supreme Court's decision in *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992), in which the court held that, in Ohio, a claim of ineffective assistance of appellate counsel must be raised not in a state trial court, but rather through an application for reconsideration filed in the state court of appeals.

The 1993 rule, which still governs ineffective-assistance-of-appellate-counsel claims in Ohio, gives criminal defendants 90 days -- starting with the date on which the court of appeals files its judgment in the defendant's original state-court direct appeal -- to raise such ineffective-assistance claims. Some Ohio appellate courts, including the one that had decided Carpenter's original direct appeal in 1990, gave those criminal defendants, like Carpenter, whose original state-court appeals had already been resolved before the new rule took effect on July 1, 1993, an additional 90 days from *that* date to file ineffective-assistance-of-appellate-counsel claims under the new rule.

On July 15, 1994, Carpenter (through new post-conviction counsel) filed a Rule 26(B) ineffective-assistance-of-appellate-counsel claim with the Ohio court of appeals. Carpenter alleged that his appellate counsel in his original



appeal in 1990 had provided ineffective assistance by failing to challenge the sufficiency of the evidence presented by the prosecution at his guilty plea hearing. Ohio law has long permitted criminal defendants who have pled guilty to aggravated murder to challenge -- in a direct appeal -- the sufficiency of the evidence supporting their convictions. *See State v. Taylor*, 30 Ohio App. 2d 252, 285 N.E.2d 89 (8th Dist. 1972).

On September 29, 1994, the state court of appeals dismissed Carpenter's Rule 26(B) ineffective-assistance-of-appellate-counsel claim, finding that he had missed the 90-day window for filing such a claim once Rule 26(B) took effect on July 1, 1993. Pet. App. 39a-42a.[1] Carpenter's reason for filing a late request to reopen his direct appeal -- that he was not aware in 1990 that he could challenge the sufficiency of the evidence on direct appeal -- was not "good cause" for missing the 90-day deadline in 1993, said the court of appeals.

---

[1] The Ohio Supreme Court later ruled that even those defendants who filed Rule 26(B) applications within 90 days after July 1, 1993 had to show "good cause" for not seeking appellate relief earlier under the predecessor provision of Rule 26(B). *State v. Reddick*, 72 Ohio St. 3d 88, 647 N.E.2d 784 (1995). Carpenter's Rule 26(B) application therefore would have been late even had he filed it within the first three months after the rule took effect, though the court of appeals applied a more lenient standard in 1993 that essentially gave persons like Carpenter a 90-day grace period after the new rule took effect on July 1, 1993. In any event, Carpenter's July 15, 1994 application for reopening of his direct appeal was untimely even under the court of appeals' more lenient approach.

Carpenter appealed, but the Ohio Supreme Court affirmed the dismissal of his Rule 26(B) application for reopening. *State v. Carpenter*, 74 Ohio St. 3d 408, 659 N.E.2d 786 (1996).

On May 3, 1996 (shortly after the effective date of AEDPA), Carpenter filed a petition for a writ of habeas corpus under 28 U.S.C. 2254 in federal district court. He alleged (1) insufficiency of the evidence supporting his plea and sentence; (2) ineffective assistance of appellate counsel; and (3) the denial of a meaningful opportunity for state-court review of his federal claims because of Ohio App. R. 26(B)'s time limit for raising ineffective-assistance-of-appellate-counsel claims.

In its opinion, Pet. App. 19a-38a, the district court determined that Carpenter had procedurally defaulted on his sufficiency-of-the-evidence claim by failing to raise it in his direct appeal, and the court found that this default was an adequate and independent state ground that foreclosed federal-court review of the claim. *Id.* at 28a. Likewise, the district court found that Carpenter had failed to comply with Ohio's procedural rule (App. Rule 26(B)) for raising ineffective-assistance-of-appellate-counsel claims. *Id.* at 29a. However, in a ruling that the Sixth Circuit did not later address on appeal, the district court concluded that Ohio appellate courts had not set a uniform statewide procedure for interpreting the "good cause" exception to Rule 26(B)'s 90-day time limit. *Id.* at 30a.[2] For that reason, said the district

[2] Should the Court grant this petition and reverse the court of appeals' decision (which rested on other grounds and did not address this point), a remand would be appropriate to allow the court of appeals to consider this part of the district court's holding.



court, Carpenter's procedural default in raising his ineffective-assistance claim did not pose an adequate and independent state ground barring federal-court review of the claim, *id.* at 29a-31a, and after reviewing that ineffective-assistance claim, the district court found it meritorious. *Id.* at 37a.

And, according to the district court, that claim of ineffective assistance could not only be reviewed in federal court as a habeas claim itself, but it also could serve as "cause" for Carpenter's procedural default on the sufficiency-of-the-evidence claim as well. *Id.* at 31a. As for "prejudice" from the allegedly deficient performance of Carpenter's first appellate lawyer, the district court found that Carpenter's sufficiency claim was "an issue of obvious strength," *id.* at 37a, was one that "a reasonably knowledgeable criminal defense attorney should at least [have] be[en] familiar with," *id.* at 36a, and showed "potential viability," *id.* at 37a, had it been raised on direct appeal. The district court, agreeing with Carpenter on his second claim for habeas relief, therefore granted a writ of habeas corpus, conditioned on a prompt reopening of his direct appeal in the state appellate court, during which he would be permitted to challenge the sufficiency of the prosecution's evidence against him. The district court declined to address the first and third claims in Carpenter's habeas petition.

Carpenter and the warden (hereinafter, "the State") both appealed. The court of appeals held that the "cause" (here, ineffective assistance) for the procedural default of

some other habeas claim (here, insufficiency of the evidence) is not itself "subject[] to a procedural default analysis before it may constitute cause." Pet. App. 8a. Carpenter, according to the court of appeals, had exhausted his ineffective-assistance-of-appellate-counsel claim by filing his Rule 26(B) application for reopening the direct appeal in 1994. "True, the state court declined to rule on the merits of his ineffective assistance of appellate counsel claim because Carpenter filed the claim late, and according to the state court, without good cause for his delay." *Id.* at 10a. The critical inquiry, however, according to the court of appeals, was simply whether Carpenter had *exhausted* his ineffective-assistance claim (by trying to raise the claim under Rule 26(B)), not whether the claim itself was *procedurally defaulted* (because it was raised too late).

> While the state court's denial of Carpenter's ineffective assistance of appellate counsel claim on procedural grounds now precludes him from raising the claim as an independent habeas claim, it does not preclude him from asserting the ineffective assistance of appellate counsel as cause for his state court procedural default of his sufficiency of the evidence claim. A petitioner is permitted to assert ineffective assistance of counsel as cause, even if the state court has denied the claim based on procedural default, so long as the claim was presented to the state courts and it is exhausted.

*Id.* at 10a-11a.



Finding that Carpenter's original appellate counsel was indeed ineffective by failing to raise the sufficiency-of-the-evidence argument in Carpenter's direct appeal, *id.* at 15a, the court of appeals held that (1) counsel's ineffectiveness had caused the default of the sufficiency claim, and (2) the ineffectiveness had prejudiced Carpenter. *Id.* at 16a. The district court had reached the right result by the wrong route, said the court of appeals, for the district court "was not required to determine whether [the ineffective-assistance claim] was procedurally defaulted, but merely whether it had been exhausted." *Id.* at 16a, n.13. Because the ineffective-assistance claim was clearly exhausted, the district court could have jumped right to the question of whether Carpenter's counsel had been constitutionally ineffective, said the court of appeals, and on that latter issue, the court of appeals agreed that he had been.

The court of appeals therefore affirmed the district court's issuance of the writ of habeas corpus. But rather than ordering that Carpenter's direct appeal in state court be reinstated, as the district court had directed, the court of appeals ordered the district court to send Carpenter's case back to the original state trial court for a new hearing on Carpenter's guilt or innocence.

## REASONS FOR GRANTING THE PETITION

Like so many of this Court's decisions interpreting and applying the statutes and rules that govern federal habeas claims, "[t]his is a case about federalism," *Coleman v. Thompson*, 501 U.S. 722, 766 (1991), for as was true in that case, this one too "concerns the respect that federal courts owe the States and the States' procedural rules when

reviewing the claims of state prisoners in federal habeas corpus." *Id.*

Though Robert Carpenter, the habeas petitioner in this case, procedurally defaulted on both a sufficiency-of-the-evidence claim (because he never raised it on direct appeal) and an ineffective-assistance-of-appellate-counsel claim (because he raised it too late under Ohio's procedural rules), the court of appeals has now revived both claims, and his case is headed back to square one in the state trial court. That decision "ignores the State's legitimate reasons for holding the prisoner," and, if left to stand, "offers state prisoners whose custody [i]s supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws." *Coleman*, 501 U.S. at 730-31. Review by this Court is therefore warranted, particularly where, as here, the decision of the court of appeals on this issue runs counter to the approach followed by every other court to consider the question.

1. No one disputes that the States are permitted to enforce a host of procedural rules to regulate their criminal trials and appeals. As the Court has said, such rules "serve vital purposes at trial, on appeal, and on state collateral attack," *Murray v. Carrier*, 477 U.S. 478, 490 (1986), for they "channel, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Reed v. Ross*, 468 U.S. 1, 10 (1984).

And all can agree as well that federal habeas petitioners who have not complied with those State rules may



nonetheless secure federal habeas review of a constitutional claim by showing both "cause" for and "prejudice" from the procedural default as prescribed by *Wainwright v. Sykes*, 433 U.S. 72 (1977), and its progeny. Even further, the Court has already held that constitutionally ineffective assistance of counsel may serve as cause for the procedural default of some other federal habeas claim. *See Murray*, 477 U.S. at 489 ("a claim of ineffective assistance . . . may be used to establish cause for a procedural default").

But the Court has never said, as did the court of appeals in this case, that a *procedurally-defaulted* ineffective-assistance claim may serve as cause for some other procedural default, and surely *Murray*, a case on which the court of appeals purported to rely, Pet. App. at 8a-10a, says nothing of the sort. Though the court of appeals saw no need even to resolve whether Carpenter had defaulted on his ineffective-assistance claim, that court did note that "Carpenter filed the claim late, and according to the state court, without good cause for his delay." *Id.* at 10a. Once the ineffective assistance claim "is exhausted," said the court of appeals, it "may be utilized as cause, . . . even if the state court has denied the claim based on a procedural default." *Id.* at 11a. Not only is that approach not supported by this Court's decision in *Murray*, it in fact runs counter to the Court's longstanding directive that habeas claims be both exhausted *and not procedurally defaulted*. *See Justus v. Murray*, 897 F.2d 709, 714 (4th Cir. 1990) ("*Murray* stands for the proposition that before an ineffective assistance of counsel claim may be raised as cause in federal habeas, it must first be exhausted in state court and not be procedurally defaulted. Any other reading of *Murray* eviscerates *Wainwright*.").

All a federal habeas petitioner need do now in Ohio -- and in the other States in the Sixth Circuit that likewise enforce procedural rules for raising ineffective-assistance-of-counsel claims[3] -- is (1) default on an ineffective-assistance claim (most likely, by missing the deadline for filing it), (2) make a vain attempt to comply with the procedural rule by filing an out-of-time ineffective-assistance claim in the state courts (thereby satisfying the exhaustion requirement, according to the court of appeals), and then (3) file a federal habeas petition blaming the allegedly ineffective state-court trial or appellate lawyer for a whole host of procedural defaults in the state-court criminal trial and direct appeal. If a federal court finds that an ineffective lawyer caused those other procedural defaults, all of those long-since-defaulted claims can come springing back to life, even though the prisoner failed to comply with the State's rules for raising the ineffectiveness claim itself.

In practical terms, the decision below has wiped out Ohio's statute of limitations for raising ineffective-assistance claims in state court, for no such claim is ever filed too late, according to the court of appeals. Even had Carpenter waited for several more years before filing his ineffective-assistance claim -- thereby further flouting the State's time limit for raising such claims under Ohio App. Rule 26(B) -- he could still have headed to federal court and relied on his procedurally defaulted ineffective-assistance-of-appellate-counsel claim to revive his similarly defaulted sufficiency-of-the-evidence claim, according to the approach now adopted

[3] Ky. R. Crim. P. 11.42(10) (three-year time limit); Tenn. Code Ann. 40-30-202(a) (one-year time limit).



by the court of appeals. Though Ohio has tried to bring a sense of finality to ineffective-assistance claims by setting and enforcing a reasonable time limit on raising such claims, the State is now left with no finality at all.

2. The decision of the court of appeals has created a square and direct conflict on the question presented in this petition. Five other circuits (the Second, Fourth, Seventh, Eighth and Eleventh) have adopted the exact opposite approach to the one chosen by the Sixth Circuit, and indeed we have found no other decisions that agree with the Sixth Circuit's analysis of this important issue of habeas procedure. *See, e.g., Pisciotti v. Washington*, 143 F.3d 296, 300 (7th Cir. 1998) ("A petitioner can establish cause for a procedural default by demonstrating that he received ineffective assistance of counsel. . . . However, the ineffective-assistance claim must have been presented to the state courts in the manner required by state procedural rules."); *Reyes v. Keane*, 118 F.3d 136, 139-40 (2nd Cir. 1997) ("Although Reyes's claim of ineffective assistance is deemed exhausted, we nonetheless find that, by defaulting on that claim in state court, Reyes forfeits that claim on federal habeas review, even though the claim is brought as cause for another procedural default."); *id.* at 140 ("a petitioner may not bring an ineffective assistance claim as cause for a default when that ineffective assistance claim itself is procedurally barred"); *Hill v. Jones*, 81 F.3d 1015, 1030 (11th Cir. 1996) ("we conclude *[Murray v.] Carrier* and the rest of the Supreme Court's jurisprudence on procedural default dictate that procedurally-defaulted claims of ineffective assistance cannot serve as cause to excuse a default of a second claim"); *id.* at 1031 ("*Carrier* requires a claim of ineffective assistance be both exhausted and not defaulted in state court

before it can be asserted as cause"), *cert. denied*, 519 U.S. 1119 (1997); *Harris v. Lockhart*, 948 F.2d 450, 452 (8th Cir. 1991) ("appellant cannot use ineffective assistance of counsel to establish cause for procedural default because his claims were neither raised in a timely manner in the state court nor addressed on the merits by the state court"); *Justus v. Murray*, 897 F.2d 709, 713 (4th Cir. 1990) ("just because claims have been exhausted, as appellant's ineffective assistance claims were, it does not necessarily mean that review of those claims will not be precluded by the procedural default rule, as review of appellant's claims is"). Several district courts have likewise adopted the same approach as all other circuit courts (except the Sixth Circuit in this case). *See, e.g., Maciel v. Carter*, 22 F. Supp.2d 843, 854 (N.D. Ill. 1998) ("Maciel's only allegation of 'cause' is his ineffective assistance of counsel claim. . . . Maciel procedurally defaulted his ineffective assistance claims. Therefore, Maciel cannot rely on ineffective assistance of counsel as the 'cause' of his procedural default."); *Szczuka v. Tucker*, 3 F. Supp.2d 58, 63 (D. Mass. 1997) ("the procedurally defaulted ineffective assistance of counsel claim cannot constitute cause for the other procedurally defaulted claims because the state court never treated the ineffective assistance claim on the merits.").

In ruling that a federal habeas court may consider a procedurally defaulted ineffective-assistance-of-counsel claim as cause for the procedural default of another habeas claim, the court of appeals has departed from the uniform course set by other lower courts. And that decision likewise runs counter to "the important interest in finality served by state procedural rules." *Coleman*, 501 U.S. at 750. Far from respecting the State's procedural rule in this case, the court of



appeals has ignored it and rendered it meaningless. And though "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it," *Coleman*, 501 U.S. at 751 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)), that principle will now carry no water in the Sixth Circuit when the States there try to set deadlines for the "timely assertion" of the right to effective assistance of counsel. Such an expansive view of the federal habeas power threatens the finality of state criminal proceedings, undercuts the States' authority to enforce their procedural rules, and tramples on the "concerns of comity and federalism . . . [that underlie] the independent and adequate state ground doctrine." *Coleman*, 501 U.S. at 730. The decision thus merits review.

3. In sum, the court of appeals' published decision now stands as a clear precedent -- and, we believe, an erroneous one -- for the lower courts to follow in our circuit, even as courts elsewhere follow a much different course. Moreover, the question presented in this petition is properly and squarely before the Court -- and the case is therefore an appropriate vehicle for the Court to address and resolve it -- precisely because the court of appeals' ruling on that issue was the *sole* basis for the judgment below. The question presented is of great concern to the States, going as it does to the heart of the States' power to enforce procedural rules governing how and when state prisoners must present federal constitutional claims in state court before seeking federal habeas review. Because the lower courts are now clearly divided on the question, review in this Court is warranted to resolve this pressing conflict.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1999



## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

Nos. 97-3392/3393

ROBERT W. CARPENTER,
Petitioner-Appellee/Cross-Appellant,

*v.*

GARY C. MOHR, WARDEN,
Respondent-Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 96-00447—Joseph P. Kinneary, District Judge.

Argued: April 28, 1998

Decided and Filed: December 18, 1998

Before: MERRITT, JONES, and NORRIS, Circuit Judges.

NATHANIEL R. JONES, Circuit Judge. Respondent Gary C. Mohr, a warden for the State of Ohio, appeals from the district court's grant of a conditional writ of habeas corpus to petitioner Robert W. Carpenter. The district court held that Carpenter's appellate counsel on direct appeal in state court was ineffective for failing to raise a sufficiency of the evidence claim, and ordered that the state court reinstate Carpenter's appeal within ninety days or a writ of habeas corpus would be issued. Carpenter cross-appeals from the district court's decision not to decide his remaining habeas claims. For the

reasons stated herein, we affirm the district court's determination that Carpenter established cause for procedurally defaulting his insufficient evidence claim. However, we remand the case for issuance of a writ of habeas corpus conditioned upon the state court granting Carpenter a new culpability hearing.

## I.

On the evening of October 5, 1988, Warren Young found the dead body of his adoptive mother Thelma Young,[4] a 73-year-old woman, in her Columbus, Ohio home. She had apparently been bludgeoned to death with a blunt object and repeatedly cut and stabbed with a sharp object and a screw driver. All of the cash kept in her purse and bedroom dresser had been removed. The next day, on October 6, 1988, Carpenter, Warren Young's close friend, telephoned 9-1-1 and stated that he had information concerning the crime. He informed the police officers investigating the crime that while he was attending to his car at a gas station, three men forced him at gun point to the rear of his car, and drove the car to Young's home. At Young's home, two men took Carpenter's shirt and glasses. According to Carpenter, the three men then forced Carpenter to knock on the door, and when Young answered pushed Carpenter inside. Carpenter asserted that one of the men went with Carpenter into Young's bedroom where he forced Carpenter to dump the contents of Young's purse on the bed. That man then took the money from Young's purse and forced Carpenter into the bathroom. While Carpenter was in the bathroom, Young was murdered. After the men left, Carpenter exited the bedroom, removed a screw driver from Young's mouth, and rolled Young's body onto its back. He retrieved his glasses and shirt that were lying near the body, picked up the screw driver and left the house. The next day he called 9-1-1.

[4] All references to "Young" are to Thelma Young.



Although the police initially considered Carpenter a witness, he was eventually arrested. The police retrieved a number of items of evidence connecting Carpenter to the crime scene, including pieces of Carpenter's clothing with blood from the victim, as well as a screw driver found in his car. J.A. at 308. Carpenter, however, consistently maintained that although he was present during the murder, others actually committed the crime.[5]

On October 14, 1989, a Franklin County Grand Jury returned an indictment charging Carpenter with one count of aggravated murder with a death penalty specification under Ohio Rev. Code § 2903.01, and one count of aggravated robbery under Ohio Rev. Code § 2911.01. Carpenter initially entered a general plea of not guilty to the charges, but as a result of a plea agreement, waived his right to a jury trial and changed his plea to a conditional guilty plea pursuant to the procedure approved in *North Carolina v. Alford*, 400 U.S. 25 (1970), in which he pleaded guilty while still maintaining his innocence. During the culpability hearing concerning his guilty plea, held before a three-judge panel, Carpenter asserted his innocence and stated that he pleaded guilty only to avoid the death penalty. J.A. at 253-55. The prosecution then recited its statements of facts concerning the charges, which the parties agreed that the defense would neither admit nor deny. J.A. at 257. No witnesses were called during the culpability hearing and no testimony or exhibits were admitted other than the prosecution's statement concerning the crime. After hearing the prosecution's statement, the three-judge panel

[5] While in jail prior to his culpability hearing, Carpenter apparently confessed to a state psychiatrist a slightly different version of events. In this version, Carpenter still maintained that he was an unwilling participant when three men forced their way into Young's home and killed her; yet admitted that the men were known to him and that he had voluntarily accompanied the men who he claimed had gone to Young's home in order to retrieve a drug debt that Young's son owed them. Carpenter also admitted to being forced to strike Young with the screw driver after she was already dead. J.A. at 613-17.

accepted Carpenter's plea and found beyond a reasonable doubt that Carpenter had committed the crimes charged in the indictment, including the death penalty specification that Carpenter was the principal offender and committed the murder during the commission of an aggravated robbery. The three-judge panel then conducted a mitigation hearing to determine Carpenter's sentence and subsequently sentenced Carpenter to a life term of imprisonment with no possibility of parole for thirty years on the aggravated murder count, and to a concurrent term of ten years minimum to twenty-five years maximum on the aggravated robbery count.

On October 9, 1990, Carpenter (through counsel) appealed his convictions and sentence to the Ohio Court of Appeals, assigning only one error.[6] The Court of Appeals affirmed the convictions and sentence, and Carpenter did not appeal this decision to the Ohio Supreme Court.

On March 13, 1992, Carpenter applied for post-conviction relief and filed a pro se petition to vacate or set aside his convictions and sentence asserting four errors.[7] The trial court dismissed the petition on June 18, 1992, finding no substantive grounds for relief. Carpenter then appealed this decision, again pro se, to the Ohio Court of Appeals asserting two errors.[8] After the state's response, Carpenter filed an additional

[6] Carpenter's counsel argued that the evidence offered in mitigation established that the only reasonable sentence was a sentence of life with possibility of parole after twenty years rather than thirty. J.A. at 61-69. He did not challenge the sufficiency of the evidence.

[7] The claims were: (1) ineffective counsel; (2) improper charging of offenses and improper sentences imposed; (3) *Alford* plea obtained illegally by coercion and threats; and (4) constitutional violations. J.A. at 85-86. He also requested production of documents to support his petition.

[8] On that appeal Carpenter argued: (1) the trial court committed reversible error in dismissing his petition to vacate sentence and failing to grant him an evidentiary hearing on his claims; and (2) the trial court erred in not ordering the clerk to convey requested documents to him.



assignment of error pro se.[9] Carpenter then obtained court-appointed counsel and on September 30, 1992, filed another brief asserting one assignment of error.[10] On December 3, 1993, the Ohio Court of Appeals affirmed the lower court decision dismissing Carpenter's petition to vacate, finding that the conclusory statements made in support of his petition were insufficient to state a ground for post-conviction relief. Carpenter (again pro se) appealed to the Ohio Supreme Court which dismissed the appeal on April 14, 1993.

On July 15, 1994, after retaining yet another counsel, Carpenter filed an application to reopen his direct appeal in the Ohio Court of Appeals pursuant to Ohio R. App. P. 26(B), alleging that his original appellate counsel was ineffective because he had failed to raise the sufficiency of the evidence claim on direct appeal. This was Carpenter's first opportunity to raise the claim of ineffective assistance of appellate counsel because under Ohio law such claims cannot be raised in post-conviction proceedings, but must be raised either in a motion for reconsideration in the court of appeals through an application to reopen direct appeal, or in an appeal to the Ohio Supreme Court. *See State v. Murnahan*, 584 N.E.2d 1204, 1208-09 (Ohio 1992). The Ohio Court of Appeals dismissed Carpenter's application on September 29, 1994, determining that Carpenter had failed to show good cause for filing his application beyond the ninety-day period required under Ohio R. App. P. 26(B)(1).[11] Carpenter subsequently appealed this

[9] The trial court's refusal to allow him requested documents violated his rights under the Ohio Constitution. J.A. at 113-17.

[10] The trial court erred by summarily dismissing Carpenter's petition for post-conviction relief without affording him an evidentiary hearing to substantiate his grounds for relief.

[11] Ohio Appellate Rule 26(B) provides in pertinent part that a defendant may appeal from a judgment of conviction or sentence based on a claim of ineffective assistance of appellate counsel by filing an application to reopen the direct appeal "in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the

decision to the Ohio Supreme Court, which on January 31, 1996 affirmed the Ohio Court of Appeals' decision in a one sentence per curiam opinion relying on the authority of *State v. Reddick*, 647 N.E.2d 784 (Ohio 1995).

On May 3, 1996, Carpenter filed a habeas corpus petition with the United States District Court for the Southern District of Ohio. He alleged: 1) insufficiency of the evidence to support his plea and subsequent sentence; 2) ineffective assistance of appellate counsel; and 3) that he was denied a meaningful opportunity to litigate his federal claims in the state courts through the application of Ohio Appellate Rule 26(B). On March 12, 1997, the district court entered judgment for Carpenter on his ineffective assistance of appellate counsel claim and ordered that a writ of habeas corpus conditionally issue unless the Ohio Court of Appeals reinstated Carpenter's direct appeal from the state conviction within ninety days. The district court did not rule on Carpenter's sufficiency of the evidence and lack of meaningful relief claims, deeming them moot. The State timely appeals from this judgment and Carpenter cross appeals from the district court's denial of relief on his two other grounds, as well as the district court's choice of remedy.

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applicant shows good cause for filing at a later time." Ohio R. App. P. 26(B)(1). Rule 26(B) also provides that an application will be granted "if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." Ohio R. App. P. 26(B)(5).

Carpenter's direct appeal was journalized on March 21, 1991, two years before the effective date of this rule, and therefore the court treated the effective date of the rule, July 1, 1993, as the start date for the time requirement. Carpenter filed his application to reopen the direct appeal on July 15, 1994, more than ninety days after the effective date of the rule.



## II.

This court reviews *de novo* a district court's disposition of a petition for a writ of habeas corpus, but nonetheless reviews the district court's factual findings for clear error. *Groseclose v. Bell*, 130 F.3d 1161, 1163 (6th Cir. 1997); *see also West v. Seabold*, 73 F.3d 81, 84 (6th Cir. 1996); *Warner v. United States*, 975 F.2d 1207, 1217 (6th Cir. 1992).

We first address Carpenter's cross-appeal because the resolution of that appeal in Carpenter's favor would render the State's appeal moot. Carpenter argues that the district court erred on several grounds by failing to reach the merits of his sufficiency of the evidence claim.[12] First, he argues that the district court erroneously applied the four part *Maupin* test for state procedural default.[13] The district court determined initially that Carpenter's sufficiency of the evidence claim was waived for purposes of habeas review because he failed to assert it in state court making it barred there due to res judicata. *See State v. Perry*, 226 N.E.2d 104, 105 (Ohio 1967) (applying res judicata to bar claim of ineffective assistance of counsel in state court); *State v. Sowell*, 598 N.E.2d 136, 140 (Ohio Ct. App. 1991) (same). Neither party contests this ruling. The district court then determined that in order to hear the claim on

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[9] Carpenter also argues that the district court erred in failing to reach the merits of his claim that Ohio Appellate Rule 26(B) precludes a petitioner from the opportunity for meaningful litigation of his or her federal claims in state court. We find that our resolution of Carpenter's sufficiency of the evidence claim renders this claim moot.

[10] Under *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986), the Sixth Circuit utilizes a four part analysis when a state argues that a federal habeas claim has been procedurally defaulted in state court. This court determines: 1) whether there is a procedural rule that is applicable to the petitioner's claim and whether the petitioner failed to follow this rule; 2) whether the state courts actually enforced the state procedural rule; 3) whether the state procedural rule is an adequate and independent state ground to foreclose federal relief; and if so 4) the petitioner must establish cause for his failure to follow the rule and prejudice by the alleged constitutional error. *Id.*

federal habeas review, it must decide if Carpenter had asserted "cause and prejudice" for the state procedural default. *See, e.g., Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994) ("If a habeas corpus petitioner is barred from presenting one or more of his claims to the state courts because of procedural default, he has waived those claims for purposes of federal habeas corpus review unless he can demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional error."); *Gravley v. Mills*, 87 F.3d 779, 785 (6th Cir. 1996); *see also Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). As "cause" for his failure to raise the sufficiency of evidence claim in state court on direct appeal, Carpenter asserted, as he is permitted to do, the ineffective assistance of his appellate counsel. *See Gravley*, 87 F.3d at 785 ("Attorney error that amounts to ineffective assistance of counsel can constitute 'cause.'"). The district court then determined that because a federal court may not consider ineffective assistance of counsel as cause for a procedural default unless the claim was itself presented to the state court as an independent claim, it was required to first determine whether Carpenter's ineffective assistance of appellate counsel claim had been preserved for habeas corpus review. J.A. at 817. The court next applied the *Maupin* test for procedural default to the ineffective assistance of appellate counsel claim, and determined that this claim had not been waived because the state procedural bar (Ohio R. App. P. 26 (B)) was not an adequate state ground upon which to deny federal habeas relief. Thus, the court determined that the ineffective assistance of Carpenter's appellate counsel could be utilized to establish cause for Carpenter's failure to raise the sufficiency of evidence claim on direct appeal, and after considering the claim, determined that Carpenter's counsel was constitutionally ineffective. The district court, however, declined to decide the sufficiency of the evidence claim, finding that its resolution of the ineffective assistance of appellate counsel claim, i.e. by ordering the state court to reinstate Carpenter's appeal, rendered the sufficiency of the evidence claim moot.

Carpenter argues that the district court erred initially by



determining that the cause for his procedural default of his sufficiency of evidence claim (here ineffective assistance of appellate counsel) must itself be subjected to a procedural default analysis before it may constitute cause. He argues that the Supreme Court's decision in *Murray v. Carrier*, 477 U.S. 478 (1986), only imposed an exhaustion requirement on the cause asserted by the habeas petitioner in connection with the procedural default of the primary habeas claim. We agree.

Carpenter is correct in that the district court erroneously conflated the exhaustion requirement with the procedural default or waiver rule. The two inquiries are analytically distinct. *See Meeks v. Bergen*, 749 F.2d 322, 324 (6th Cir. 1984) (noting that "the question of whether a respondent is barred from litigating in a federal habeas corpus proceeding constitutional claims that were forfeited before the state court is distinct from the issue of exhausted state remedies"); *see also Engle v. Isaac*, 456 U.S. 107, 125-26 n. 28 (1982) (finding that waiver is separate from the question of exhaustion and exhaustion simply requires a petitioner to exhaust those remedies "available in the court of the State"). In *Murray*, the Court held that an ineffective assistance of appellate counsel claim must merely be presented to the state courts as an independent claim, before it can be used to establish cause for the state procedural default of a separate claim. *Murray*, 477 U.S. at 488-89. In so doing, the Court stated:

> [W]e think that the exhaustion doctrine, which is 'principally designed to protect the state courts' role in the enforcement of state judicial proceedings' generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. The question whether there is cause for a procedural default does not pose any occasion for applying the exhaustion doctrine when the federal habeas court can adjudicate the question of cause -- a question of federal law-- without deciding an independent and unexhausted constitutional claim on the merits. But if a petitioner could raise his

> ineffective assistance claim for the first time on federal habeas in order to show cause for a procedural default, the federal habeas court would find itself in the anomalous position of adjudicating an unexhausted constitutional claim for which state court review might still be available. The principle of comity that underlies the exhaustion doctrine would be ill served by a rule that allowed a federal district court 'to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation' and that holds true whether an ineffective assistance claim is asserted as cause for a procedural default or denominated as an independent ground for habeas relief.

*Id.* (citations omitted). A careful reading of *Murray* makes clear that the Supreme Court was concerned only that a federal court not infringe on a state court's right to decide issues pertaining to the state court conviction first, and thus felt that an exhaustion requirement, one that had not previously been required in reference to the cause element, needed to be implemented.

"Th[is] exhaustion requirement is satisfied when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims." *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). Significantly, "[t]o exhaust his or her remedies, a petitioner for federal habeas corpus relief is only required to raise his claims before the state's highest court. The fact that the state court does not address the merits of the claim does not preclude a finding of exhaustion." *Id.* at 883; *see also Rudolph v. Parke*, 856 F.2d 738, 739 (6th Cir. 1988) ("It is settled law in this circuit that a constitutional claim which is presented to the state courts, regardless of whether they address and dispose of it, will satisfy the exhaustion requirement."). Furthermore, exhaustion applies even if a claim was procedurally defaulted in state court, because in such cases there are no longer remedies available for the petitioner to exhaust. *See Gray v. Netherland*, 518 U.S. 152, 161 (1996); *Coleman v. Thompson*, 501 U.S. 722, 732 (1991); *Engle*, 456 U.S. at 125-26 n.28 (1988).



Here, the state expressly conceded that Carpenter exhausted his ineffective assistance of appellate counsel claim. J.A. at 16. Carpenter presented his ineffective assistance of appellate counsel claim in his state court petition to reopen his direct appeal, and thus provided the state court with the first opportunity to determine the claim. When this petition was denied, he then appealed that denial to the Ohio Supreme Court. True, the state court declined to rule on the merits of his ineffective assistance of appellate counsel claim because Carpenter filed the claim late, and according to the state court, without good cause for his delay. Carpenter, however, has exhausted all available state remedies for the claims. While the state court's denial of Carpenter's ineffective assistance of appellate counsel claim on procedural grounds now precludes him from raising the claim as an independent habeas claim, it does not preclude him from asserting the ineffective assistance of appellate counsel as cause for his state court procedural default of his sufficiency of the evidence claim. A petitioner is permitted to assert ineffective assistance of counsel as cause, even if the state court has denied the claim based on a procedural default, so long as the claim was presented to the state courts and it is exhausted. Put another way, the Supreme Court simply requires exhaustion of the ineffective assistance of counsel claim in order for it to constitute cause. The claim must be presented to the state courts, and all available remedies foreclosed, or the exhaustion requirement will not be met. Once all available remedies in state court are precluded and the state court may no longer pass on the claim, however, it is exhausted and may be utilized as cause. There is no additional requirement beyond exhaustion in order for a petitioner to utilize ineffective assistance of appellate counsel as cause for the procedural default of an independent claim. *Cf. Meeks*, 749 F.2d at 325-26 (finding that a petitioner's habeas claims were exhausted when the petitioner joined the claims in an application for delayed appeal in state court, even though the claim was ultimately denied in state court due to a procedural

default).

We do note that, although our review of the issue has not found a large number of cases directly addressing the issue, the Second and Seventh Circuits have considered the issue in slightly different contexts. *See, e.g., Reyes v. Keane*, 118 F.3d 136, 139-40 (2d Cir. 1997) (habeas petitioner who fails to raise a claim of ineffective assistance of trial counsel in state court may not present that claim as cause for procedurally defaulted habeas claim); *Lemons v. O'Sullivan*, 54 F.3d 357, 360-61 (7th Cir. 1995) (same). Those cases are distinguishable from the present case, for in both cases the petitioner completely failed to raise the ineffective assistance claim in state court. Here, however, Carpenter raised the claim in the primary avenue available to him under Ohio law (application to reopen his direct appeal). Hence, Carpenter provided the state court with the first opportunity to address the claim, although the court declined to do so on a procedural basis. Therefore, we do not decide whether a petitioner's complete failure to raise an ineffective assistance claim in the state courts would be insufficient under *Murray*. Under a broad reading of *Murray*, we note that it probably would be insufficient, as the Seventh and Second Circuits have held.

Therefore, we conclude that the district court erred by finding that before it could consider whether the ineffective assistance of Carpenter's appellate counsel established cause for the state procedural default of Carpenter's sufficiency of the evidence claim, it must first determine whether the ineffective assistance of appellate counsel claim was itself procedurally defaulted, rather than simply exhausted. Principles of comity do not require placing a procedural default analysis on claims asserted as cause. We believe that the exhaustion requirement mandated by *Murray* is sufficient, and ensures that the state court has the first opportunity to hear such claims. Moreover, as noted earlier, a petitioner will be effectively "punished" for procedurally defaulting the ineffective assistance claim by only being able to assert it as cause for a procedural default and not being permitted to assert it as an independent habeas claim.



The Supreme Court in *Murray* did not implement a procedural default requirement for claims asserted as cause, and until it does, we see no reason to engraft such a requirement on our own.

Once shown to be exhausted, the ineffective assistance of appellate counsel could be properly utilized as cause for the default of the sufficiency of the evidence claim, and the court was then required to continue the cause and prejudice analysis by determining whether the ineffective assistance of appellate counsel rose to the level of a constitutional violation, thereby satisfying the cause element for excusal of state procedural default. *See, e.g., Rust*, 17 F.3d at 161 (noting that attorney error may constitute cause if it constitutes ineffective assistance of counsel under the test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984)); *Ritchie v. Eberhart*, 11 F.3d 587, 591 (6th Cir. 1993). In order for ineffective assistance of appellate counsel to rise to the level of a Sixth Amendment violation, the performance of Carpenter's counsel: 1) must be deficient, in that it is below an objective standard of reasonableness, and 2) this deficient performance must have prejudiced his appeal. *See Bowen v. Foltz*, 763 F.2d 191, 194 (6th Cir. 1985); *cf. also Strickland*, 466 U.S. at 688, 694; *West*, 73 F.3d at 84. A petitioner may establish prejudice by demonstrating that there is a reasonable probability that but for counsel's errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. Carpenter argues, and the district court determined below, that his appellate counsel's failure to raise the sufficiency of the evidence on direct appeal, and only raising the significantly weaker claim that Carpenter was entitled to parole after twenty rather than thirty years, was constitutionally deficient.

Under normal circumstances a plea of guilty precludes the defendant from attacking the sufficiency of the evidence under Ohio law. *See State v. Hertz*, 135 N.E.2d 781 (Ohio Ct. App. 1954)(per curiam). Ohio law, however, requires that a party who pleads guilty to aggravated murder appear before a three-judge panel which must "examine the witnesses, determine

whether the accused is guilty of aggravated murder . . . and pronounce sentence accordingly." O.R.C. § 2945.06. Challenges to the sufficiency of the evidence are therefore expressly permitted on aggravated murder charges. *See State v. Taylor*, 285 N.E.2d 89, 96 (Ohio Ct. App. 1972); *see also State v. Leasure*, No. 1755, 1992 WL 174663 (Ohio Ct. App. July 22, 1992) (challenging the sufficiency of the evidence after guilty plea). In addition, the Ohio Supreme Court has recently affirmed that a guilty plea conviction supported only by the prosecution's recitation of the facts "does not satisfy the evidence requirements of Crim. R. 11 and R.C. 2945.06." *State v. Green*, 689 N.E.2d 556, 559 (Ohio 1998). In *Green*, a unanimous court held that during a culpability hearing on a guilty plea, the three-judge panel must examine witnesses, and in that case found that because Green's conviction was not supported by any evidence other than the prosecution's factual recitation, it must be reversed and remanded for a new trial. *Id.* at 559-60.

As an additional point, we note that although *Green* was decided after Carpenter raised his claims in state court, application of the rule pronounced in *Green* to this case does not present a retroactivity problem under *Teague v. Lane*, 489 U.S. 288, 301 (1989). The Ohio Supreme Court's decision in *Green* does not constitute a "new rule," nor does it create a new constitutional right as contemplated by *Teague*. Indeed, *Green* relies upon the plain language of O.R.C. § 2945.06, which has been in effect since 1991, and the Ohio Supreme Court's decision in *State v. Post*, 513 N.E.2d 754, 756 (Ohio 1987). Moreover, *Green* specifically notes the "inherent dangers" in relying solely on the prosecutor's recitation of the facts considering the well-settled principle that "a statement of facts by a prosecutor does not constitute evidence." *Green*, 689 N.E.2d at 559 (citing *State v. Davis*, 581 N.E.2d 1362, 1373 (Ohio 1991)). Finally, although *Green* was a state law ruling, it certainly has constitutional import, for due process requires that a state criminal conviction be supported by sufficient and adequate evidence on the elements of the offense. *See Jackson v. Virginia*, 443 U.S. 307, 323-24 (1979). Consequently,



application of the standards most recently articulated in *Green* neither "breaks new ground [nor] imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301.

The district court in the case *sub judice* noted that a reasonably knowledgeable criminal defense attorney would have known that the sufficiency of the evidence could be challenged following a guilty plea to aggravated murder, and that the specific facts of Carpenter's case warranted a sufficiency of the evidence challenge on appeal. We agree. First, since *Taylor* in 1972, it has been well-established law in Ohio that the sufficiency of the evidence may be challenged on the appeal of an aggravated murder conviction. Second, Carpenter never wavered from his protestations of innocence, only entering a conditional guilty plea, and only in order to avoid the death penalty. Finally, the only information before the panel was the prosecution's recitation of the facts, which as noted previously is not evidence. *See Green*, 689 N.E.2d at 559; *Davis*, 581 N.E.2d at 1373. Here, no witnesses were called as required by Ohio Rev. Code § 2945.06, and no independent evidence was submitted. Carpenter's case mirrors that of *Green* where guilt was established only through the prosecution's recitation of the facts, and the conviction was reversed on appeal.[14] Therefore, the facts of Carpenter's case clearly supported a sufficiency of the evidence challenge and it is unfathomable why Carpenter's counsel failed to raise a

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[14] A prosecution's recitation of the facts may be considered evidence with the explicit consent of the defense. *See Post*, 513 N.E.2d at 766. The Ohio Court of Appeals on Carpenter's application to reopen his direct appeal seemed to imply that his counsel's decision to neither admit nor deny these facts was such explicit consent, but did not rely on that basis for denying Carpenter's application. J.A. at 186-87. In light of the fact that defense counsel in *Green* had made no such stipulation, the Ohio Supreme Court expressly declined to reconsider *Post*. *Green*, 689 N.E.2d at 559. Neither party in this case thoroughly briefed the issue on appeal, and the district court did not address it below. Upon remand, the district court may rule on the issue.

sufficiency of the evidence claim on appeal. We find that his complete failure to raise such an integral part of Carpenter's case and his raising of a significantly weaker claim, illustrates that his counsel was constitutionally ineffective. *See, e.g., Reed v. Ross*, 468 U.S. 1, 13-14 (1984) (noting that although tactical decisions do not make out a claim for ineffective assistance, the failure to raise a significant constitutional claim may); *Clemmons v. Delo*, 124 F.3d 944, 953-54 (8th Cir. 1997) (finding ineffective assistance of appellate counsel where appellate counsel failed to raise obvious claim on direct appeal); *Banks v. Reynolds*, 54 F.3d 1508, 1515 (10th Cir. 1995) (failure to raise "dead bang winner" claim on appeal was constitutionally ineffective assistance of appellate counsel even though other strong claims were raised); *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994) (noting that petitioner may establish ineffective assistance of appellate counsel if he shows that counsel ignored significant obvious issue while pursuing weaker claims); *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) (finding ineffective assistance of appellate counsel when counsel failed to raise substantial claim but instead raised weaker one); *Matire v. Wainright*, 811 F.2d 1430, 1438 (11th Cir. 1987) (same). Thus, Carpenter has asserted sufficient cause for his failure to raise the sufficiency of the evidence on direct appeal and because, as noted, the claim is clearly a viable one, he has also established prejudice from his counsel's failure to raise the claim.[15] Accordingly, the ineffective assistance of Carpenter's appellate counsel excused his failure to raise the sufficiency of the evidence claim on direct appeal in state court.[16] *Cf. Gravley*, 87 F.3d at 786.

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[15] Although we find that Carpenter has established prejudice from the failure to raise the sufficiency of the evidence on appeal, in that there is a reasonable probability that the result of the proceedings may have been different, we do not decide the claim here.

[16] Although reaching the same conclusion as this court, that ineffective assistance of appellate counsel excused Carpenter's failure to raise the sufficiency of the evidence claim in state court, the district court's analysis was different. The district court found below that the ineffective assistance of counsel claim may constitute cause for the state procedural default of the sufficiency of the evidence claim, even though it too had been procedurally defaulted in state court, because the state court rule utilized as a basis for barring the ineffective assistance of appellate counsel claim, Ohio R. App. P. 26(B), was not an adequate and independent state ground to foreclose relief. The district court found that the good cause requirement of the rule had been inconsistently applied in the state courts. While we agree that it appears that the good cause requirement has not been uniformly applied in state court, we need not reach the issue because of our ruling that in determining whether the ineffective assistance of appellate counsel could constitute cause for the default of the sufficiency of the evidence claim, the district court was not required to determine whether it was procedurally defaulted, but merely whether it had been exhausted. Our analysis of whether the ineffective assistance of appellate counsel claim rose to the level of a constitutional violation, however, follows that of the district court below.



Upon establishing that Carpenter had sufficiently asserted cause for procedural default of his insufficiency of the evidence claim, the district court determined that the appropriate remedy would be to issue the writ conditioned upon the state court reinstating Carpenter's direct appeal. We agree that a conditional writ is the appropriate remedy in this case. We conclude, however, that because the state court has already made its position concerning Carpenter's appeal relatively clear, ordering the state court to reinstate the direct appeal would simply prolong resolution of this case. If and when the state court denied the appeal, Carpenter would simply file a successive habeas petition reasserting his claims and again requesting federal review. Considering that Carpenter's initial complaint was that his culpability hearing went awry, we find that the more appropriate resolution here is for the district court to issue the writ of habeas corpus conditioned upon the state court granting Carpenter a new culpability hearing in accordance with state and federal law.

## III.

For the foregoing reasons, we **AFFIRM** the district court's judgment that the ineffective assistance of Carpenter's appellate counsel constituted cause for the procedural default of his insufficiency of the evidence claim, but **REMAND** the case to the district court for the imposition of a remedy consistent with this opinion. Our resolution of the cross-appeal in Carpenter's favor renders moot the State's direct appeal of the district court's grant of a conditional writ of habeas corpus to Carpenter.



## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Nos. 97-3392/3393

ROBERT W. CARPENTER,
Petitioner-Appellee/Cross-Appellant,

*v.*

GARY C. MOHR, WARDEN,
Respondent-Appellant/Cross-Appellee.

[Filed: March 24, 1999]

Before: MERRITT, JONES, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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No. C-2-96-447

ROBERT CARPENTER, Petitioner

*v.*

GARY MOHR, WARDEN, Respondent.

[Filed: March 12, 1997]

OPINION AND ORDER

Petitioner, a state prisoner, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on the instant petition, Respondent's return of writ, Petitioner's traverse, and the exhibits of the parties.

On October 14, 1989, Petitioner was indicted by the Franklin County Grand Jury for one count of aggravated murder, with a death penalty specification, and one count of aggravated robbery. Represented by two attorneys, Petitioner entered *Alford* pleas to both counts on March 29, 1990, whereafter a mitigation hearing was held to determine Petitioner's sentence. Petitioner received a life sentence for the aggravated murder, and a concurrent ten (10) to twenty-five (25) year sentence for the aggravated robbery.



Represented by an assistant Franklin County public defender, Petitioner appealed to the Court of Appeals for the Tenth Appellate District. He raised the following assignment of error:

> The evidence offered at the mitigation hearing was such that the three judge panel could only reasonably conclude that the appropriate sentence was life with the possibility of parole after twenty full years of imprisonment.

On March 12, 1991, the Court of Appeals affirmed the judgment of the trial court. It does not appear from the record that Petitioner appealed the Court of Appeals' decision to the Supreme Court of Ohio.

However, on March 13, 1992, Petitioner filed a *pro se* post-conviction action in the trial court. He raised the following issues for review:

1. Ineffective Counsel,
2. Improper charging or offenses, and improper sentences imposed;
3. Illegal plea of guilty obtained by coercion, and inappropriate information and improper dialogue with the court pursuant to Rule 11; and
4. Constitutional violations.

On June 18, 1992, the trial court dismissed Petitioner's action on the ground that he had "shown no substantive grounds for relief."

Petitioner filed a *pro se* appeal to the Court of Appeals for

the Tenth Appellate District, and raised the following assignments of error:

1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING APPELLANT'S PETITION TO VACATE OR SET ASIDE JUDGEMENT (sic) OF CONVICTION IN NOT GRANTING AN EVIDENTIARY HEARING AS REQUIRED BY REVISED CODE § 2953.21(E), IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF THE LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

2. THE TRIAL COURT ERRED IN NOT ORDERING THE CLERK TO CONVEY REQUESTED DOCUMENTS TO APPELLANT.

Thereafter, counsel was appointed to assist Petitioner with his appeal. Counsel filed an additional brief on September 30, 1992, wherein he raised the following argument.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY SUMMARILY DISMISSING APPELLANT'S PETITIONS FOR POST CONVICTION RELIEF UNDER OHIO REVISED CODE § 2953.21 (C) AND (E).

On December 3, 1992, the Court of Appeals affirmed the judgment of the trial court on the ground that "[t]he petition filed by defendant is insufficient to state a claim for post-conviction relief under R.C. 2953.21."

Petitioner then filed a *pro se* appeal to the Supreme Court of Ohio. He raised two propositions of law:



1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING APPELLANT'S PETITION TO VACATE OR SET ASIDE JUDGMENT (sic) OF CONVICTION IN NOT GRANTING AN EVIDENTIARY HEARING AS REQUIRED BY REVISED CODE § 2953.21(E), IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF THE LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

2. THE TRIAL COURT ERRED IN NOT ORDERING THE CLERK TO CONVEY REQUESTED DOCUMENTS TO APPELLANT.

On April 14, 1993, the Supreme Court of Ohio dismissed Petitioner's appeal.

Represented by new counsel, Petitioner filed an application in the Court of Appeals to reopen his direct appeal on the basis of ineffective assistance of appellate counsel. Petitioner's new attorney assigned as error appellate counsel's failure to raise the following issue:

THE JUDGMENT OF THE THREE-JUDGE PANEL OF THE COURT OF COMMON PLEA FINDING DEFENDANT-APPELLANT GUILTY OF AGGRAVATED MURDER AND A SPECIFICATION THAT HE WAS THE PRINCIPAL OFFENDER IS NOT SUPPORTED BY SUFFICIENT COMPETENT EVIDENCE ESTABLISHING ALL THE ELEMENTS OF THE OFFENSE AND THE SPECIFICATION, AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

On September 29, 1994, the Court of Appeals denied

Petitioner's request to reopen his direct appeal on the basis of Petitioner's failure to show good cause why he could not have filed the motion within the ninety-day period required by Ohio R. App. P. 26(B)(1).

Petitioner sought leave to appeal to the Supreme court of Ohio. On June 14, 1995, the Supreme Court accepted jurisdiction, and set deadlines for the filing of merit briefs. Petitioner raised the following propositions of law:

1. The applicability of the good cause exception to the ninety day time period for the filing of an application to reopen an appeal in a criminal case under App. R. 26(B)(1) must be evaluated by balancing the interests under the facts of a particular case so as to give effect to the overriding concern that a defendant have a meaningful opportunity required by the due process cause of the fifth and fourteenth amendments to the federal constitution to challenge his conviction.

2. In balancing the interests of the parties and evaluating the defendant's showing of good cause for the filing of an application for reopening after the ninety day time period has expired, the court of appeals must consider whether the defendant possessed actual knowledge during the ninety day period of the existence of the grounds for appeal not raised by his appellate counsel, or had reason to question the constitutionality of his conviction on grounds not raised by his appellate counsel. The court of appeals must also consider whether it was appellate counsel's own deficient performance that resulted in the reopening at an earlier time, or whether defendant deliberately by-passed the



orderly procedures in the rules of appellate procedure.

3. In balancing the interests of the parties and evaluating the defendant's showing of good cause for the filing of an application for reopening after the ninety day time period has expired, the court of appeals must consider the effect that the passage of time between the journalization of the appellate judgment of the appellate judgment and the filing of the application for reopening will have on the state's ability to defend against defendant's challenge. The absence of material prejudice to the state weights in favor of a finding of good cause.

On January 31, 1996, the Supreme Court of Ohio affirmed the Court of Appeals' decision without opinion.

This federal habeas corpus action ensued. Petitioner seeks a writ of habeas corpus based on the following claims for relief:

Ground One: The State of Ohio failed to produce sufficient evidence to support Petitioner's conviction for aggravated murder and a principal offender specification, in violation of his rights under the Fifth and Fourteenth Amendments to the U.S. Constitution.

Supporting Facts: Following Petitioner's *Alford* plea to the offense of aggravated murder with a principal offender specification, the State failed to produce competent credible evidence during the culpability

hearing that he participated in a purposeful killing of the homicide victim and that he was the principal offender. The Ohio statute and procedural rule relating to the acceptance of a guilty plea to aggravated murder impose a duty on the prosecution to prove the material elements of the offense beyond a reasonable doubt.

Ground Two: Petitioner was denied the effective assistance of counsel in his direct appeal from his conviction, in violation of his rights under the Sixth Amendment to the U.S. Constitution.

Supporting Facts: In his direct appeal from his conviction, Petitioner's appointed counsel failed to raise an assignment of error directed to the sufficiency of the evidence necessary to support his conviction for aggravated murder with a principal offender specification. The failure to raise this issue deprived Petitioner of competent counsel guaranteed to him by the Constitution, and resulted in prejudice to him.

Ground Three: Petitioner was denied a meaningful opportunity to raise the issue of ineffective assistance of appellate counsel in the state courts, in violation of his



rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Supporting Facts: The state appellate courts arbitrarily rejected Petitioner's attempts to reopen his appeal to raise the sufficiency of the evidence issue. The Ohio courts routinely apply the "good cause" exception [to] the ninety day time limit to reopen an appellate judgment in such a manner that "good cause" is never found. As a result, Petitioner and others are denied any meaningful opportunity to have their appellate claims heard on the merits.

Respondent argues in the first instance that Petitioner's first and second claims are procedurally barred. Respondent argues in the alternative that all of Petitioner's claims lack merit The Court will first address Respondent's argument that Petitioner's first and second claims are procedurally barred.

**I.**

In recognition of the equal obligation of the state courts to protect the constitutional rights of criminal defendants, and in order to prevent needless friction between the state and federal courts, a state criminal defendant with federal constitutional claims is required fairly to present those claims to the highest court of the state for consideration. 28 U.S.C. § 2254(b), (c). If he fails to do so, but still has an avenue open to him by which he may present the claims, his petition is subject to

dismissal for failure to exhaust state remedies. *Id.*; *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). But if, because of procedural default, the petitioner can no longer present his claims to a state court, he has also waived them for purposes of federal habeas review unless he can demonstrate cause for the procedural default and actual prejudice from the alleged constitutional error. *Murray v. Carrier*, 477 U.S. 478, 485 (1986), *Engle v. Isaac*, 456 U.S. 107, 129 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

In the Sixth Circuit, a four-part analysis must be undertaken when the state argues that a federal habeas claim is precluded by the petitioner's failure to observe a state procedural rule. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). "First, the court must determine that there is a procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Id.* Second, the Court must determine whether the state courts actually enforced the state procedural sanction. *Id.* Third, it must be decided whether the state procedural forfeiture is an adequate and independent state ground upon which the state can rely to foreclose review of a federal constitutional claim. *Id.* Finally, if the Court has determined that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate that there was cause for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error. *Id.*.

The first part of the *Maupin* test requires the Court to determine whether Petitioner violated a procedural rule. The failure to raise a claim on direct appeal that appears on the face of the record constitutes a procedural default under Ohio's



doctrine of *res judicata*. *See State v. Cole*, 2 Ohio St. 3d 112 (1982); *State v. Perry*, 10 Ohio St. 2d 175 (1967). In the instant case, Petitioner's first claim for relief, *i.e.*, that the State failed to produce sufficient evidence of Petitioner's guilt, addresses an alleged error which would appear on the face of the record. Accordingly, Petitioner's failure to raise this claim on direct appeal constitutes a procedural default under Ohio's doctrine of *res judicata*.

The state courts were never given an opportunity to enforce the procedural rule in this instance due to the nature of Petitioner's procedural default. Consequently, the Court deems the second part of *Maupin* test to have been satisfied.

The Court further finds that the procedural rule is an adequate and independent state ground upon which to deny relief. The doctrine of *res judicata* is stated in unmistakable terms in numerous Ohio decisions, and Ohio courts have consistently refused to review claims on the merits under that doctrine. *See State v. Cole*, 2 Ohio St. 3d 112 (1982); *State v. Ishmail*, 67 Ohio St. 2d 16 (1981); *State v. Perry*, 10 Ohio St. 2d 175 (1967). Further, the doctrine of *res judicata* serves the state's interests in finality, and in ensuring that claims are adjudicated at the earliest possible opportunity.

The Court having found that Petitioner's first claim for relief is subject to a procedural default, and that this procedural rule provides an adequate and independent ground for denying relief, it is incumbent upon Petitioner to demonstrate both cause for his procedural default, and actual prejudice resulting from the alleged error. As cause for the failure to raise his sufficiency of the evidence claim on direct appeal, Petitioner asserts ineffective assistance of appellate counsel. Given that

"[a] federal court may not consider ineffective assistance of counsel as cause for a procedural default unless the ineffectiveness claim was itself presented to the state courts as an independent claim," this Court must first determine whether Petitioner's ineffective assistance of appellate counsel claim has been preserved for federal habeas corpus review.

**II.**

Applying the *Maupin* analysis therefore, this Court must first determine whether a procedural rule applies to Petitioner's claim, and if so, whether Petitioner violated that rule. In Ohio, claims of ineffective assistance of appellate counsel must be raised in an application to reopen the direct appeal within ninety days of the Court of Appeals' judgment entry. *State v. Murnahan*, 63 Ohio St. 3d 60 (1992); Ohio R. App. P. 26(B). Untimely applications may be filed only by leave of the court of appeals upon a showing of good cause for the delay[17] Petitioner filed an application to reopen his direct appeal on the basis of ineffective assistance of appellate counsel on July 15, 1994. In an effort to comply with the Ohio R. App. P. 26(B), Petitioner alleged as cause for his failure to file this application within the allotted time period that he had relied on appellate counsel's expertise, and was himself unaware at the time of his direct appeal that his attorney could have raised a sufficiency of the evidence claim following his guilty plea. The Court of Appeals rejected this allegation, and dismissed Petitioner's application for the failure to show cause for the untimely filing.

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[17] In *State v. Reddick*, 72 Ohio St. 3d 88 (1995), the Supreme Court of Ohio held that the 90-day limit and good cause exception imposed by the July 1, 1993 amendment to Ohio R. App. P. should apply to cases which predated that amendment.



The Supreme Court of Ohio affirmed the Court of Appeals' decision. Thus, the first and second parts of the *Maupin* test would appear to be satisfied.

The third part of the *Maupin* test requires this Court to determine whether the state procedural rule is an adequate and independent ground for precluding relief. To be "independent," the procedural rule at issue, as well as the state court's reliance thereon, must rely in no part on federal law. *See Coleman v. Thompson*, 501 U.S. 722, 732-33 (1991). To be adequate, the state procedural rule must be firmly established and regularly followed by the state courts. *Ford v. Georgia*, 498 U.S. 411 (1991). "[O]nly a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." *Id.* at 423 (quoting *James v. Kentucky*, 466 U.S. 341, 348-351 (1984); *see also Barr v. City of Columbia* 378 U.S. 146, 149 (1964); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964). It is difficult, in light of the foregoing, for this Court to find that the procedural rule in this case was "firmly established and regularly followed" by the state courts at the time that Petitioner filed his delayed motion for reconsideration.

A review of Ohio appellate court decisions reveals that at the time that Petitioner filed his application, there are was no firmly established state procedure for enforcing the "good cause" requirement for applications that were not filed within the ninety day period. For instance, it appears that some Ohio appellate courts apply a standard under which "good cause" will almost never be found. *See State v. Owens*, 1996 WL 146097, No. 84 C.A. 131 (Ohio App. Dist. 7 Mar. 29, 1996). Other Ohio appellate courts employ a standard under which

"good cause" will almost always be found. *See State v. Nitenson*, 1994 WL 679894, No. 91 C.A. 796 (Ohio App. Dist. 4 Feb. 24, 1994). Still other Ohio appellate courts appear to avoid the "good cause" issue, and proceed instead to the merits of the applicant's claim(s). *See State v. Holland*, 1994 WL 142735, No. 92AP-853 (Ohio App,. Dist. 10 Apr. 21, 1994).

The Supreme Court of Ohio has offered little guidance. This Court could not find a single appeal wherein the Supreme Court of Ohio found "good cause" for the untimely filing of an application for delayed reconsideration brought pursuant to Ohio R. App. P. 26(B). In *State v. White*, 72 Ohio St. 3d 91, 92-93 (1995), the applicant sought review by the Ohio Supreme Court of the Court of Appeals' decision that the applicant had failed to show good cause for the untimely filing of his applicant for reconsideration. The applicant's attorney, an Assistant Ohio Public Defender, had attached an affidavit to the application explaining that he had been unable to file the application sooner due to his heavy workload, and that the defendant was in no way responsible for the delay. The Ohio Supreme court affirmed the Court of Appeals' determination that the explanation did not suffice as "good cause." Justice Wright dissented from the decision, stating that "I must respectfully dissent because I believe that this court should not take such a rigid attitude toward standards that will suffice for 'good cause.'" *Id.* at 92. Justice Wright went on to remark that:

> [A]s for the assertion that lack of counsel does not excuse the untimely application for reopening, the majority places a great deal of faith in the ability of a layperson, within ninety days, to realize that his appellate counsel was ineffective, realize why the appellate counsel was ineffective, and understand how to ask the court of appeals to address the ineffectiveness. All this when, in most cases, the indigent incarcerated inmate does not receive the court of appeals' decision from his or her appellate lawyer in a timely fashion, if at all. My word, what a statute!



*Id.* at 93.

In sum, this Court finds that Petitioner's ineffective assistance of appellate counsel claim is not barred by procedural default. As such, Petitioner is not precluded from raising that claim as an individual ground for relief, or as cause for the procedural default of his first claim for relief. In order to suffice as cause for the procedural default of his first claim for relief, the appellate attorney error alleged by Petitioner must rise to the level of an independent constitutional violation. *See Coleman v. Thompson*, 501 U.S. 722 (1991); *Strickland v. Washington*, 466 U.S. 668 (1984); *see also Ritchie v. Eberhart*, 11 F.3d 587 (6th Cir. 1994). That being the case, determining whether Petitioner has established cause for the procedural default applicable to his first claim for relief effectively requires the Court to address the merits of Petitioner's second claim for relief. Accordingly, the Court will address the merits of Petitioner's second claim for relief, *i.e.*, ineffective assistance of appellate counsel, before concluding the *Maupin* analysis of the first claim for relief.

## III.

In his second claim for relief, Petitioner alleges ineffective assistance of appellate counsel. The right to counsel guaranteed by the Sixth Amendment is the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 711 n.14 (1970). The standard for reviewing a claim of ineffective assistance of counsel is twofold:

> First, the defendant must show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable.

*Strickland v. Washington*, 466 U.S. 668, 686 (1984). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

To establish prejudice, a petitioner must demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because Petitioner must satisfy both prongs of the *Strickland* test to demonstrate ineffective assistance of counsel, should the Court determine that Petitioner has failed to satisfy one prong, it need not consider the other. *Id.* at 697.

The *Strickland* test applies to appellate counsel. *Burger v. Kemp*, 483 U.S. 776 (1987). Counsel on the first appeal as of right must exercise reasonable professional judgment. *Evitts v. Lucey*, 469 U.S. 397 (1985). "[W]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (citing *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). It is not enough for the Petitioner to merely argue that his appellate counsel failed to raise a nonfrivolous claim, for counsel does not have a duty to advance every nonfrivolous argument which is available. However, a petitioner may establish that counsel rendered constitutionally inadequate representation if the petitioner can show that counsel ignored



obvious issues of strength, while including those which were clearly and significantly weaker. *Mayo v. Henderson*, 13 F.3d 528, 533 (2nd Cir. 1994). In *Gray v. Greer*, 880 F.2d 644, 646 (7th Cir. 1985), the Seventh Circuit explained:

> When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.

*Id.*

In the instant case, Petitioner's attorney on direct appeal raised a single assignment error, *i.e.*, that the trial court had erred in imposing a life sentence instead of a life sentence with the possibility of parole after twenty years. Petitioner contends that any lawyer reasonably knowledgeable of criminal law would have challenged the sufficiency of the evidence supporting Petitioner's conviction for the aggravated murder offense and the accompanying specification. According to Petitioner, at the time his direct appeal was taken, legal precedent existed for challenging the sufficiency of the evidence following a plea of guilty to aggravated murder. Petitioner also argues that at the time of his appeal, legal precedent existed for modification of the degree of homicide on appeal based upon the sufficiency of the evidence adduced during the R.C. § 2945.06 hearing. *State v. Place*, 25 Ohio App. 2d 158 (1971) (modifying the trial court's judgment that the defendant was guilty of murder in the first degree, because there was only sufficient evidence to support a judgment that the defendant was guilty of murder in the second degree.) Under *Strickland*, however, it is not enough for Petitioner merely to assert that counsel neglected to raise a claim that was available. In assessing Petitioner's allegation, this Court must

determine—not whether Petitioner's appellate counsel could have challenged the sufficiency of the evidence, or even whether Petitioner's appellate counsel *should* have raised that issue in the sense that it might have been beneficial to Petitioner—but whether the failure of Petitioner's appellate counsel to raise a sufficiency of the evidence claim was so egregious under professional norms governing his field, that he was not functioning as the advocate guaranteed by the Sixth Amendment to the United States Constitution.

Ordinarily, a defendant may not attack the sufficiency of the evidence following his plea of guilty. *State v. Hertz*, 135 N.E.2d 781 (Ohio App., 10 Dist. 1954). This principle does not apply to defendants who plead guilty to aggravated murder because of the unique statutory provision at R.C. § 2945.06. *State v. Taylor*, 30 Ohio App. 2d 252, 261 (1972). Section 2945.06 of the Ohio Revised Code provides in pertinent part:

> If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly.

Thus, in *State v. Tayor, supra*, the Court of Appeals for Cuyahoga County held that "since the *Hertz* case did not involve a murder case, nor a degree hearing, it can hardly be authority for blocking an appeal from the decision after proceedings under R.C. § 2945.06." *Id.* at 261. Petitioner correctly asserts, therefore, that legal precedent existed at the time of his appeal was taken for challenging the sufficiency of the evidence as to the degree of the offense to which he pleaded guilty. But the inquiry does not end here.

To resolve Petitioner's allegation of ineffective appellate counsel, this Court must determine whether challenging the sufficiency of the evidence under the specific facts of Petitioner's case was such a widely known and utilized practice under the standards governing criminal defense



attorneys, that appellate counsel's failure to raise the claim was professionally unreasonable. Two inquires are inherent in this task: (1) whether challenging the sufficiency of the evidence following a plea of guilty to aggravated murder was a standard practice under professional norms; and (2) whether most reasonable criminal defense attorneys would have challenged the sufficiency of the evidence under the facts of Petitioner's case. With respect to the first of these inquiries, a review of Ohio cases involving a plea of guilty or no contest to a charge of aggravated murder reveals that defendants often—though not always, or even most of the time—raise some sort of issue on appeal surrounding the culpability hearing required under R.C. § 2945.06 and/or the sufficiency of the evidence to support the degree of homicide.[18]

The foregoing suggests to this Court that the practice of challenging on direct appeal the sufficiency of the evidence to

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[18] In the following appellate cases, the defendants, following pleas of guilty to aggravated murder, challenged on direct appeal either the sufficiency of the evidence supporting the degree of homicide, or the trial court's alleged deviation from the procedure required under R.C. § 2945.06. *State v. Snyder*, 1996 WL 307268, No. 94 C.A. 2080 (Ohio App. 4 Dist. Jun. 4, 1996); *State v. Burrage*, 1992 WL 174663 No. 1755 (Ohio App. 4 Dist. Jul. 22, 1992); *State v. Korp*, 1989 WL 132127, No. 56132 (Ohio App. 8 Dist. Nov. 2, 1989); *State v. Hedrick* 1988 WL 18767, No. 53422 (Ohio App. 8 Dist. Feb. 18, 1988).

By contrast, the following appellate decisions involved defendants who, after pleading guilty to aggravated murder, did *not* challenge on direct appeal either the sufficiency of the evidence supporting the offense of aggravated murder, or whether the trial court had deviated from the procedures required under R.C. § 2945.06. *State v. Gesser*, 1956 WL 465406, No. 94 C.A. 225 (Ohio App. 7 Dist. Aug. 14, 1996); *State v. Anderson*, 108 Ohio App. 3d 5 (9 Dist. 1995); *State v. Roberson*, 1995 WL 23343 (Ohio App. 8 Dist. Jan. 19, 1995); *State v. Thompson*, 1993 WL 116081, No. CA-9063 (Ohio App. 5 Dist. Apr. 12, 1993); *State v. Stumpf*, 1986 WL 6502, Nos. CA760. CA-793 (Ohio App. May 22, 1986).

support a finding of guilt to a charge of aggravated murder following a guilty plea, while not so widely used as to be "automatic," is nonetheless far from novel. In any event, it is reasonable to conclude that a reasonably knowledgeable criminal defense attorney should at least be familiar with the issue.

As for the second inquiry, the Court finds that the specific facts of Petitioner's case warranted a sufficiency of the evidence challenge on direct appeal. Petitioner had maintained his innocence throughout the proceedings against him, and only entered a guilty plea pursuant to *Alford v. North Carolina*, 400 U.S. 25 (1970), to avoid the potential consequences of going to trial. For that reason, Petitioner refused to adopt the statement of facts proffered by the prosecutor during the R.C. § 2945.06 culpability hearing. (Transcript, at 15-17.) *See State v. Post*, 32 Ohio St. 3d 380, 393-93 (1987) (holding that a statement of facts may satisfy the evidentiary requirement of R.C. § 2945.06, but only where the accused or his counsel has expressly or impliedly waived those procedures.).

Further, the single assignment of error raised by Petitioner's appellate counsel was: "The evidence offered at the mitigation hearing was such that the three judge panel could only reasonably conclude that the appropriate sentence was life with the possibility of parole after twenty fully years of imprisonment." Thus, the entire essence of appellate counsel's brief focused on the appropriateness of the sentence that Petitioner had received, *i.e.*, the extent of Petitioner's culpability. In light of that fact, it is that much more difficult to understand why counsel would not have raised a sufficiency of the evidence challenge with respect to the degree of the offense in addition to—if not in lieu of—a simple challenge of the sentence imposed by the three judge panel following the mitigation hearing. The foregoing strongly suggests that counsel's failure to raise a sufficiency of the evidence challenge was not a tactical decision, but an oversight.

In sum, the Court is persuaded that Petitioner has a made a



*prima facie* showing of ineffective assistance of appellate counsel. Petitioner has demonstrated that appellate counsel neglected to raise on appeal an issue of obvious strength, and raised instead a claim which was clearly and significantly weaker. Further, without holding that there was insufficient evidence to support Petitioner's conviction for aggravated murder, the Court notes that the apparent absence in the trial record of any evidence as to the degree of the homicide—and therefore the potential viability of a sufficiency of the evidence challenge on direct appeal—is sufficient to undermine confidence in the outcome of Petitioner's direct appeal. Accordingly, Petitioner's second claim for relief is well taken.

**III.**

In his first claim for relief, Petitioner argues that there was insufficient evidence to support his conviction for aggravated murder. Petitioner contends in this third claim for relief that he was denied a meaningful opportunity to present his ineffective assistance of counsel claim by virtue of the fact that the appellate courts arbitrarily rejected his argument for "good cause," and that Ohio appellate courts routinely sue the "good cause" exception to the ninety day time limit in a manner such that good cause is never found. Because the Court has sustained Petitioner's second claim for relief, and finds that the appropriate remedy is to reinstate his direct appeal, it is unnecessary to reach a decision on Petitioner's other habeas corpus claims.

**IV.**

For the foregoing reasons, the Court finds that Petitioner's second claim for relief is meritorious, and should be sustained. The motion for a writ of habeas corpus is thus GRANTED as to Petitioner's second claim for relief, unless within ninety (90) days, the Ohio Court of Appeals reinstates Mr. Carpenter's direct appeal.

/s/JOSEPH P. KINNEARY
United States District Judge

## APPENDIX D

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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No. 90AP-803
(Regular Calendar)

STATE OF OHIO, Plaintiff-Appellee,

*v.*

ROBERT CARPENTER, Defendant-Appellant.

[Filed: September 29, 1994]

MEMORANDUM DECISION

ON MOTION

YOUNG, J.

Defendant-appellant, Robert Carpenter, has filed a *pro se* application for reopening of this court's decision in *State v. Carpenter* (Mar. 12, 1991), Franklin App. No. 90AP-803, unreported (1991 Opinions 1032) pursuant to App.R. 26(B). In that decision, journalized on March 12, 1991, this court affirmed the judgment of the Franklin County Court of Common Pleas finding defendant guilty of aggravated robbery and aggravated murder.

The history of this case is as follows: appellant was indicted by the Franklin County Grand Jury for one count of aggravated murder with penalty specifications and one count of aggravated robbery. The aggravated murder count alleged



that, on October 5, 1988, appellant purposely caused the death of Thelma Young while committing the offense of aggravated robbery.

Appellant waived his right to a jury trial and agreed to have the case tried before a three-judge panel. In order to avoid a trial, appellant followed a procedure upheld in *North Carolina v. Alford* (1970), 400 U.S. 25, and entered a guilty plea, although he maintained his innocence. The guilty plea was accepted by the court after a recitation of facts by the prosecution. Both the prosecution and the defense then presented witnesses at a mitigation hearing and, on May 21, 1990, the trial court imposed a sentence of life with the possibility of parole only after serving thirty years. The court also imposed a concurrent sentence of ten to twenty full years on the aggravated robbery charge.

In his first appeal to this court, appellant argued that the appropriate sentence should have been life with the possibility of parole after twenty, as opposed to thirty full years. This court affirmed the trial court's sentence.

In his application for reopening, appellant argues that his appellate counsel was ineffective, for failure to raise the sufficiency of the evidence as an assignment of error in his initial appeal. Pursuant to App.R. 26(B), a criminal defendant may raise a claim of ineffective assistance of appellate counsel by applying to reopen his direct appeal. Under the rule, an application for reopening must be filed "within ninety days from journalization of the appellate judgment."

The appellate judgment in this case was journalized on March 12, 1991, prior to the effective date of App.R. 26(B), July 1, 1993. In similar cases where the appellate judgment has been journalized prior to July 1, 1993, this court has essentially treated this ninety-day period as running from the effective date of App.R. 26(B). See *State v. Courtright* (Aug. 9, 1994), Franklin App. No. 86AP-34, unreported; *State v. Carpenter* (Aug. 11, 1994), Franklin app. No. 88AP-1181,

unreported. Clearly, appellant's motion for reopening was filed more than ninety days after the effective day of July 1, 1993, and a much longer time after the Supreme Court's decision in *State v. Murnahan* (1992), 63 Ohio St.3d 60, the predecessor to App.R. 26(B).

An application for reopening filed outside the ninety-day time limit should be denied unless the appellant can show good cause for filing at a later time. App.R. 26(B)(2)(b). Appellant asserts that he has shown good cause because he was not aware that he could raise an assignment of error directed to the sufficiency of the evidence.

A review of the transcript demonstrates that appellant waived his right to a jury trial and agreed to have the case heard by a three-judge panel. In addition, appellant sought to avoid a trial and, therefore, entered a guilty plea. The court questioned appellant extensively to ascertain that appellant's waiver of a jury trial, and his entering of a guilty plea, were done knowingly and voluntarily. In fact, the trial court refused to accept appellant's guilty plea, until the prosecution went forth with its proffer of the facts. The trial court explained that the prosecution had to demonstrate facts that touched all the essential elements of the crime charged in the indictment. Then, and only then, did the trial court believe it was empowered to accept appellant's plea. Appellant's counsel agreed with this approach.

Appellant's counsel further stipulated to the recitation of the facts as proffered by the state for purposes of the mitigation hearing. In *State v. Post* (1987), 32 Ohio St.3d 380, the Ohio Supreme Court stated in pertinent part:

> "Agreements, waivers and stipulations made by the accused, or by the accused's counsel in his presence, during the course of a criminal trial are binding and enforceable. See *State v. Robbins* (1964), 176 Ohio St. 362, 27 O.O.2d 312, 199 N.E.2d 742, paragraph two of the syllabus. Although R.C. 2945.06 requires the court to



> 'examine the witnesses' in determining whether the accused is guilty of aggravated murder, we find that appellant was bound by the agreed-upon procedure wherein the state would proffer a statement of facts in lieu of witnesses or other evidence." *Id.* at 393.

Accordingly, we find that appellant has failed to set forth any showing of good cause for filing beyond the ninety-day period required by App.R. 26(B)(1). If appellant was prejudiced by ineffective assistance of counsel in 1990, this fact should have been known to him by the time the Supreme Court decided *Murnahan, supra*, in 1992, and even more so by the effective date of App.R. 26(B). Appellant has therefore failed to show good cause for his delay in filing more than ninety days after the effective date of App.R. 26(B). Thus, appellant's application for reopening is denied.

*Motion denied.*

PETREE and CLOSE, JJ., concur.